

SITE ACQUISITION AND RELATED ENVIRONMENTAL CONCERNS

**Report of the Joint Legislative Audit Committee
Chairman, Scott Wildman**

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Special Thanks to the JLAC Staff

**Bryan Steele, Project Director
Maria Armoudian
Jennifer Pierce
Greg Campbell**

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Acquiring Urban Land for Public School Construction and Related Environmental Concerns

Joint Legislative Audit Committee Informational Hearing, June 17, 1998
A POST HEARING REPORT

EXECUTIVE SUMMARY

On June 17, 1998, an informational hearing was held by the Joint Legislative Audit Committee. The hearing examined land acquisition policy and practice in relation to new school construction projects. During the course of the hearing, witnesses identified two distinct areas of concern:

1. Acquiring land for new schools in congested urban settings;
2. Managing the conflict that may arise from local, state and federal environmental regulation.

Considerable testimony focused on the Los Angeles Unified School District's (LAUSD) Jefferson Middle School, a story that dramatizes what can go wrong when districts build schools on contaminated land.

Witnesses from the LAUSD and the San Diego City Unified School District (SDCUSD) described how their districts acquire land for new schools in crowded urban neighborhoods. The LAUSD described a process that appeared to be driven largely by administrative expediencies, where members of the community are merely informed rather than involved in the decision making process. It is the clearly stated opinion of the LAUSD that purchasing industrial land contaminated with toxins for the purpose of building new schools is at times unavoidable.

SDCUSD testified to an approach that is significantly different than LAUSD's top-down methods of land acquisition. The SDCUSD explained that they bring the community into the process from day one as active collaborators. It is the SDCUSD's opinion that this high degree of collaboration has resulted in their district having never seriously considered the use of contaminated land for new schools. This laudable aversion to building on toxic properties by the SDCUSD exists despite this district having recently built many schools in crowded urban neighborhoods.

THE STORY OF LAUSD'S JEFFERSON MIDDLE SCHOOL

The LAUSD purchased a highly toxic 15-acre site for their new Jefferson Middle School in 1990. The site is located in a highly industrialized area and directly across the street from a federal superfund site. Soil and water beneath the Jefferson site not only contain the known carcinogen Chromium 6 at levels 540 percent higher than allowed by law, but

other harmful toxins as well. While the LAUSD removed and replaced the top 15 – 20 feet of soil at the site prior to building the new school, they arguably hid the extent of the toxic problem from the state. There is every indication that the district not only failed to properly assess the contaminants at the Jefferson site, but may have withheld what they did know from state officials in a rush to receive \$11,834,812 in state land purchase funding.

Jefferson's toxic problems became known after a state EPA scientist noticed by coincidence, while across the street working on the clean-up of the neighboring superfund site, Hard Chrome Products, that a school was under construction. The LAUSD subsequently was required to conduct new toxic assessments that in turn demonstrated the extent of the contamination problem. Today, soil and water remediation efforts are under way at the site. There is concern, however, that not only are these mitigation efforts after-the-fact, but the precise nature of their success is unknown. Students are scheduled to begin classes at the Jefferson Middle School site this fall.

Financial liability concerning the mitigation of the contaminated groundwater is very much an outstanding controversy. LAUSD may be named a responsible party to the groundwater clean-up effort at a yet to be determined cost to the public. On July 10, 1998, the LAUSD formally requested that the State Allocation Board (SAB) reimburse the district for \$513,000 in toxic clean-up costs at the Jefferson site. The SAB has yet to approve this additional funding request.

Other issues discussed at the hearing:

- Identification of toxic contaminants prior to eviction by eminent domain requires cooperation with those who may be unwillingly evicted.
- Districts that otherwise practice due diligence can be tangled in the overlapping authority and conflicting/changing rules of various government oversight agencies.

BUILDING SCHOOLS IN URBAN SETTINGS

Urban school districts like San Diego and Los Angeles do not always have the option of buying vacant land for new schools. Instead, urban districts often have the complicated task of acquiring land through the process of eminent domain, where private land is taken by a public agency through force of law.

Oftentimes, controversy arises when choosing the type of land to be acquired for new a school project: desirable residential or business properties vs. otherwise vacant or unwanted industrial land which may be degraded by toxic contamination.

The Los Angeles Unified School District (LAUSD) and the San Diego City Unified School District (SDCUSD) offered testimony that demonstrated two very different approaches to acquiring urban land. The LAUSD represented this process as a case of either/or: either evict residents and business owners from their property, and thereby reduce the already limited supply of low-income housing and local jobs, or remediate land contaminated by industrial use. In contrast, the SDCUSD stressed active collaboration between community members and district staff as a means of avoiding even the consideration of contaminated property.

The LAUSD's Approach to Acquiring Urban Land for New School Construction

Speaking for the LAUSD, Real Estate and Asset Management Branch Director, Robert Niccum, testified that choosing the location for a new school is inherently a political process. Niccum testified that:

The problem [with residential land] is that you have to take out some of the homes of those students in the process of building that new school. So you're close to the students who remain but some of them have now moved out of the community.

It is no surprise that people are going to object to being moved out of their homes or apartments. So school districts frequently will hit a buzz saw in what seems to them as being the best environment for a new school. So for the elected official, the choice becomes a very difficult one.

The committee is obviously interested in receiving information about the Jefferson Middle School project. It has been alluded to earlier that although the site ultimately acquired involved industrial property, the original site that was identified for that school involved primarily residential property -- 162 homes and apartments. The upshot of that school site exploration was that my school board member and I found ourselves in front of 900 residents of the community and the city council member criticizing us for taking a site that would displace that many people. When you get that kind of adverse reaction in a community there is a strong incentive to look at other kinds of property.

The other kinds of property then become and include industrial kinds of property. [Industrial properties] are not inherently the kinds of properties one thinks of in terms of a school. But because they don't involve taking homes they do come into consideration. The problem is of course that if the site itself is not contaminated, it

is probably next to one that is contaminated or nearby other uses that are polluting the air. Even taking commercial properties doesn't solve the political problem that you have when moving people out of their residences because you are taking jobs.

Even if there is no perfect site, a school board can't throw up its hands and say: We can't build schools. The kids are coming so the school board has to do something. So we have to weigh, balance, consider and analyze all the factors involved with a particular site and community reaction. There is no formula for picking the least ugly duckling. You can't say we will never take industrial property. Instead, what you have to do is collect sufficient information so that the elected official can make an informed choice.

Decision makers face impossible kinds of comparisons in that process: How many stores are we willing to wipe out in order to save thirty apartments; how much farther are we willing to make kids walk in order to reduce the displacement of homes by 20 percent? In short, the process of urban school settings is one of trade-offs, but the one trade-off that can never be made, and that LA Unified would never make, is the safety of students.

Niccum's testimony demonstrates an approach which relies heavily on political considerations rather than objective environmental criteria. It appears the LAUSD listens for the reaction of community members and politicians, and then follows the path of least resistance. It is understandable, therefore, that the district and many local residents would opt for attempting to remediate contamination on fallow toxic properties rather than proceed with residential evictions. The question remains: Is this approach consistent with legislative intent which clearly states that school will only be built on safe sites? (Education Code, Section 17211 et. seq.)

What kind of informed choice does this top-down scenario represent? Considering the emotional aspect of eviction and the complicated nature of environmental remediation, it is

no wonder that a community often chooses remediating unsightly land over displacing residents -- especially when the remediation process is represented as completely safe. The result is that the LAUSD may be, in some cases, acquiring urban land for new school construction based on political expedience, while disregarding the environmental costs and health risks associated with the cleanup of polluted land.

While the LAUSD claims to work collaboratively with community members before making final construction decisions, the evidence does not support these assertions. Prior to those events that recently led to significant community unrest, there were only three community meetings on record pertaining to the Jefferson school. The following is the only record of an individual meeting related to the Jefferson project available to the committee after an exhaustive period of discovery:

The most recent community meeting regarding the proposed [Jefferson] project was held on June 8, 1988 at the Main Street School in southeastern Los Angeles. The purpose of this meeting was to inform the community of the proposed project and identify relocation and acquisition procedures. The community input received at this meeting primarily discussed issues involved in the overall Jefferson High School attendance area site selection process such as displacement of residential homes although no homes are located on this site and the poor quality of the schools in general. Site specific concerns addressed included traffic and loss of jobs.¹

One of the tenets of collaboration is the meaningful sharing of decisions. Having community members attend at a few meetings to vent their general concerns does not appear to constitute meaningful collaboration.

It is important to remember that city populations increase beyond school capacities because of enrollment growth and local planning failures. Eviction by eminent domain can

¹ Draft Environmental Impact Report, Jefferson New Junior High School No.1, LAUSD June 1988.

be an after-the-fact approach to urban planning. Residents and businesses are asked to move from neighborhoods to make way for schools because city and district officials fail to plan for their classroom capacity needs as those needs arise, and because the state has failed to adequately fund new school construction for the past several decades.

The SDCUSD's Approach to Acquiring Urban Land for New School Construction

The SDCUSD's approach to acquiring urban land for new schools can be characterized as the opposite of the LAUSD. SDCUSD officials testified that by focusing on community collaboration, the district and community work together from the onset to seek solutions as a team. Representing the SDCUSD, Business Services Director, Pat Zollar, testified that:

In the past 5 years, SDCUSD has purchased over 50 acres of property for the construction of 7 new schools, 5 of those in urban areas of our district. Of the 50 acres, all but 3 of the 200 parcels had existing conditions on them such as primarily multi-family apartments and a few commercial businesses such as liquor and small convenience stores. None of our land purchases to date have required the condemnation or the purchase of former industrial land.

Q: How did you accomplish all this land acquisition without having to resort to purchasing environmentally damaged land or incurring community unrest?

A: We work very closely with our community. I think that is the key issue. We are able to bring everyone along so that there is meaningful community collaboration. In addition, although relocation funds are pretty much set, there is room to maneuver. Our goal is to leave each resident and owner whole.

For example, in one urban area where we had to acquire 13 acres, the district had looked at a site that would have been the most cost effective. It was a couple of

blocks away from a commercial street where the land is more expensive. But along that [commercial] strip is where the community was dealing with drug houses and a liquor store where illicit drugs were sold. The community wanted to rid themselves of these problems.

At the same time the community identified a canyon area where there had been illegal dumping for many years. To use the canyon would have required cleaning and leveling it in order to use the site. We showed [community members] the numbers and the cost benefit analysis so that we came together on the need to place the new school along the strip of commercial property. The end product was a safe place for the school and a benefit for the community. It's that kind of give and take dialogue that takes many many hours of community and evening meetings -- but it can be done.

Q: During this or any other acquisition process, did you have any difficulty disclosing any information to the public?

A: No.

Q: Is there any proprietary information where you feel a need to withhold from public view?

A: No.

Q: Do you feel this open information policy has helped the process?

A: Yes, absolutely.

Jefferson Middle School - LAUSD

Accenting the need for meaningful community collaboration was the testimony of Concerned Citizens of South Central Los Angeles (CCSCLA), represented by Executive Director, Juanita Tate. It is CCSCLA's position that the LAUSD did not adequately

inform the community about the toxic hazards at Jefferson. According to CCSCLA materials made available at the hearing, a local resident first made CCSCLA aware of the contaminant risk at Jefferson in October 1996 -- seven years after the LAUSD first acknowledged the problem in their initial Environmental Assessment (EIR). Compounding this lack of public communication is the ongoing difficulty encountered by CCSCLA when making information requests of the LAUSD.

Of specific concern to the committee is the personnel shift that coincided with the hearing. The director of the LAUSD's Environmental Health and Safety Branch, Hamid Arabzadeh, testified at the hearing that some mistakes were made in the building of Jefferson -- a conclusion that was reinforced by the testimony of other witnesses. The committee was informed by Arabzadeh that forty-eight hours after testifying before the committee, he was asked to sign a retraction of his testimony and informed of his impending termination. As of July 13, 1998, Arabzadeh, who holds numerous degrees in environmental science, has spent years working in the private sector as an environmental consultant and who currently teaches environmental theory at UC, Irvine, was placed on involuntary administrative leave. While the committee is not suggesting that Arabzadeh's pending termination is directly caused by his testimony, it is concerned by Arabzadeh's allegations and with the timing of LAUSD's actions.

The fact that the LAUSD improperly handled the environmental mitigation of Jefferson is, according to testimony given by the California Environmental Protection Agency, irrefutable. Director of the Department of Toxic Substances Control (DTSC), Jesse Huff, offered the following testimony before the committee:

Our experience indicates that initially there was a scientific reason for concern over the use of this former industrial site. Numerous businesses including a former W.W. II defense plant, furniture manufacturers, metal plating operations and a gas station occupied the Jefferson Middle School (JMS) property for various industrial operations from approximately 1930 to 1985. In view of waste handling practices

of the time, 1930-1970, it is likely that wastes spilled and/or were released on the ground. Given the previous site uses, the initial environmental assessment should have been conducted under the oversight of an environmental agency.

Today, however, there is no immediate health threat posed by the property's current condition. During the school construction, the top layer of soil, ranging from 15 - 25 feet below grade surface, was removed and back filled by materials that were spread over the entire school property. Under the oversight of the department, the LAUSD conducted additional site assessment at the school site in June 1997. Based on a review of the site assessment report for the property, dated July 18, 1997, the department's toxicologists determined that there is no health threat to students, employees or the public from any hazardous substances in the soil at the Jefferson Middle School site.

However, environmental concerns still exist at the property due to the potential for contamination remaining in the ground water. Further investigation is warranted because trichloroethylene, total chromium and hexavalent chromium have impacted the ground water in the north and northwest portion of the school site.

In September 1997, the LAUSD requested that the Water Board be the lead agency to the Jefferson site.

In March 1996, the department requested and received the Phase I and Phase II reports for the JMS site. Our review of the Phase I and II environmental assessment reports indicated they were inadequate for a site of its size -- its about 13 acres -- with past extensive industrial activity. The focus of the Phase I appears to be underground fuel storage tanks. It provided very little detail of the nature of the industrial activities.

The Phase II also focused on areas with underground tanks with only 17 soil samples collected and analyzed for heavy metals only.

The JMS project did not come to the department's attention until July 1995. The department immediately offered the LAUSD oversight assistance. At that time it was DTSC's understanding that the Water Board was providing oversight assistance on some aspects of the project. The LAUSD did not express interest in working with the department until April 1997, when they requested DTSC oversight under its voluntary program for additional site assessment to address additional public concern.

To ensure that future school acquisitions do not incur problems similar to those seen at JMS, the LAUSD should conduct appropriate environmental due diligence including risk evaluation prior to acquisition.

As I read it, the law is very clear as to what needs to happen. It seems to me that throughout the state of California the law is followed, the law is observed. It seems to me that our review of the preliminary assessment, Phase I and II, found them both to be deficient. There is so much process built into the law now that it is very troubling that this in fact did occur. Local school districts, particularly the largest one in the state, should be able to read the law.

The committee also heard from the LAUSD's outside environmental counsel, James M. Wakefield, who was recently hired to assist with the Jefferson problem. Wakefield argued that a national security blackout surrounding W.W. II defense manufacturing at the site prohibited the district's otherwise diligent efforts to understand all past uses of the Jefferson site. While the committee respects Wakefield's position, it would seem reasonable to assume that, absent complete information, due diligence would require an even more exhaustive toxic discovery effort than normal, particularly in light of what was

known about the Jefferson site prior to purchase and especially when the construction of our public schools is involved.

Especially troubling is counsel's use of the terms "normal" and "required" when refuting charges of failed due diligence on the part of the LAUSD. It strikes the committee as reasonable that there is nothing *normal* about building a school on environmentally degraded property when that property has a known history of toxic industrial use and for which there are otherwise incomplete records. Further, seeking the shelter of legal *requirements* as a means of explaining away why the district did not make an extra discovery effort appears problematic – especially when the actions of the district seem to be less than forthright. This entire discussion is not about fulfilling some narrow interpretation of "what is required" but whether or not the district acted responsibly.

Despite Mr. Huff's assertion that the Jefferson site, which is scheduled to open for classes this September 1998, is safe, and that no further ground remediation is currently underway, Director of the Los Angeles Regional Water Control Board, James Ross, testified to the contrary. Ross testified that there is current soil remediation underway at the Jefferson site that began operation November 14, 1997, to remove the contaminant trichloroethylene (TCE), another known carcinogen from the soil. According to recent LAUSD reports made to the Water Board, there has been an approximate 50 percent reduction of TCEs since start-up. While Ross testified that he expected soil remediation to be complete in time for the beginning of school, in a follow-up letter from his Executive Director, James D. Kuykendall, it is Kuykendall's expectation that soil remediation efforts will continue for a minimum of one year.

Further complicating Ross' position was testimony from ENVIRONMENTAL STRATEGIES Principal, Rosanne Harding, REA, who once worked on the Jefferson acquisition project for the LAUSD and now is a private environmental consultant. Harding stressed the unpredictability of many environmental remediation processes including the technique being used at Jefferson. Harding also testified that toxic remediation, especially

heavy metals, is “all experimental.” It was Harding’s opinion that the exposure to liability of a school district should make such sites as Jefferson unacceptable. In further support of Harding’s assertions was additional testimony provided by Arabzadeh who stated:

We know something about a minority of toxins and even less about the effects of these toxins when combined. This is compounded by the unique characteristics of adolescent development.

What further concerns the committee is that all remediation efforts overseen by the state began after the school buildings were substantially completed.² The remediation technique of choice, soil vapor extraction (SVE), is not, according to experts, the best technique of many available but rather, the only choice left considering that the school had already been built by the time the district was required to properly test and remediate environmental concerns. Further, there is only one SVE currently in operation on the 15-acre site.

Not only is the success of SVE indeterminate but it is highly contingent on the nature of the contaminant and soil. Clay and dampness, for instance, are especially problematic for the success of SVE. Clay was found recently in soil borings taken from the Jefferson site as were high levels of moist soil.³

It remains unclear whether these remediation efforts are sufficient enough to ensure an acceptable level of safety at Jefferson Middle School.

Beyond SVE, one remediation technique that would solve many of the Jefferson site’s problems involves:

- Removing all the new soil to an adequate depth;

² Letter from Assistant Executive Director of the California Regional Quality Control Board, James D. Kuykendall, to Assemblymember Scott Wildman, July 20, 1998.

³ December 3, 1997, Letter from Miller Brooks Environmental to David Hung, California Regional Water Control Board.

- Installing an impermeable barrier over the contaminated soil;
- Replacing the soil with new fill;
- Rebuilding the structures.

When asked if such an approach would have been prudent before building the school, Kuykendall stated in a letter to the committee that:

For hexavalent chromium and VOC, any non-permeable barrier would be of value. Such barriers are normally installed near the surface either as a shallow clay compacted layer, asphalt or concrete pavement or as an actual vapor fabric barrier placed under building footprints.⁴

To install such a non-permeable layer now would, of course, require the entire new school to be razed. However, a nonpermeable barrier would accomplish two objectives:

1. Protect against harmful VOCs, which have the ability to convert to deadly vinyl chloride gas, from collecting in classrooms and offices over time;
2. Stem the percolation of further heavy metals into the ground water.

The need for such drastic action is refuted by those involved in remediation efforts. It is important to realize, however, that statements supporting the success of current remediation efforts are based on expectations that are admittedly founded in part on hope, conjecture and theory. While razing the new school is a drastic alternative, such a measure demonstrates how the district might have initially acted had safety been of primary concern, and objective analysis had driven district decisions.

WHY WAS THE JEFFERSON PROJECT APPROVED BY BOTH THE CALIFORNIA DEPARTMENT OF EDUCATION (CDE) AND THE STATE

⁴ Letter from Assistant Executive Director of the California Regional Quality Control Board, James D. Kuykendall, to Assemblymember Scott Wildman, July 20, 1998.

OFFICE OF PUBLIC SCHOOL CONSTRUCTION (OPSC) DESPITE OUTSTANDING TOXIC ISSUES?

Before a new school-building project can receive state funding it must first be approved by the California Department of Education (CDE). Concerning the CDE's site approval responsibilities, the following testimony dialogue with the CDE's School Planning Director Henry J. Heydt ensued:

Q: *What is the involvement of your field staff with the site selection process?*

A: Field staff are very active and physically review the sites – usually a selection of three [prospective sites]. The district must then conduct a geotechnic evaluation of the site. Toxicity is evaluated if there is anything on the site. When the report comes in and toxicity levels are too high, we do not approve the site.

[Why CDE field representative Betty Hanson approved the Jefferson project to her superiors remains unclear. The question of CDE approval will be examined in greater detail as an addendum to this report].

Q: *Do you take the word of the district as to what the levels of toxicity are at the site?*

A: Not really. The need to submit a site package includes specific forms [pink sheets] that include toxicity details.

Q: *How many field staff work for the CDE?*

A: Eight for the state.

Q: *Who in your group makes the determination that each site complies with appropriate environmental regulations?*

A: It is the field reps decision after receiving the site package. The rep then sends the recommendation to the assistant director of the OPSC who normally cosigns them unless there are ongoing mitigation issues.

Q: In your analysis of site acquisition do you look into any waivers for environmental hazards granted by the district purchaser to the seller?

A: We really don't get involved in the local decisions. Our criteria is based on the standards we developed in Title 5. Categorically, our limit to involvement is Title 5.

Q: So you don't really offer any oversight, just assessment of the information provided.

A: Yes.

It remains unclear from Heydt's testimony whether or not the CDE has sufficient resources to ensure that proposed school projects ascribe to legal guidelines.

The other agency with potential involvement in site approval is the DTSC (Department of Toxic Substances Control). When asked if his department had the necessary oversight authority to intervene if deemed necessary, Huff replied:

A: The department has complete enforcement authority to intervene at any time, if deemed necessary. However, it is preferable for all parties concerned that appropriate environmental due diligence is conducted prior to property acquisition. Remediation could be conducted if necessary in the event that it was determined that the property should still be acquired. Using this proactive approach would ensure that there are no surprises and that after-the-fact responses would not occur.

Q: *Does the DTSC have the adequate resources to fulfill their responsibilities?*

A: The DTSC has sufficient resources. Our resources consist of those used to generally provide responses for information requests of the public as well as resources provided by project proponents through our voluntary program.

The DTSC system failed because, according to Huff's testimony, the department was not informed of the problem at Jefferson until 1995. It is unclear from the testimony of the CDE exactly what caused them to approve the Jefferson site in 1989. Whether the cause of approval was a failed system or failed decisions, determination of this key question will be provided by this committee in its final Jefferson report.

**HOW WAS JEFFERSON BUILT SO THAT ENVIRONMENTAL
REMEDiation WAS THE LAST PART OF THE PROJECT RATHER THAN
THE FIRST AS DICTATED BY THE SAB, EPA, AND CDE?**

One explanation might begin with the tone set by Robert Niccum, the director of the LAUSD's real estate branch, who also serves as the district's California Environmental Quality Act officer. While there is nothing technically inappropriate about this

arrangement, having the district's senior real estate procurer also in charge of coordinating environmental oversight places business concerns in competition with environmental safety. Compounding the unavoidable conflict represented by this arrangement is the chain-of-command authority held over the LAUSD's Health and Environmental Safety Branch by district business officials. In order to ensure complete objectivity in environmental decisions, the LAUSD may wish to consider shifting their environmental oversight branch to a position of more autonomy and more authority in relation to the district's business interests.

Evidence of safety competing with politics and business interests is also evidenced in an LAUSD document entitled "REPORT OF FINDING AND OVERRIDING CONSIDERATIONS: Jefferson Area New Junior High School No. 1" dated October 1988. This document, prepared by the district's real estate department, states as its introduction:

This report has been prepared in conjunction with the Environmental Impact Report (EIR) relating to the Jefferson Area New Middle School No. 1. The report Consists of three elements: (1) an Impact Summary highlighting the major areas of concern, potential impacts, and mitigating measures, all of which are described more fully in the EIR; (2) the findings of the Board of Education regarding the potential impacts; and (3) the Statement of Overriding Considerations, which sets forward the reasons why the project should be approved notwithstanding possible unavoidable effects.

The EIR portion of this document states under the banner "Human Health" that:

The results of the site reconnaissance and records search indicate the potential for adverse environmental impact as a result of historic and/or present activities. The proposed junior high school site is located in an area that is predominantly used as a furniture manufacturing facility. This business may handle hazardous materials

related to the furniture finishing activities and reportedly has underground tanks for the storage of fuel oil. There is a potential for hazardous liquids to have impacted the subsurface of the site in the event of improper historic or present storage and handling practices.

The EIR goes on to state that, “A thorough environmental site assessment of potential toxic hazards shall be prepared.” But no such “thorough” effort was made until the LAUSD was forced to do so by the California EPA (Cal/EPA) after school construction was substantially completed..

Problems at the Jefferson site came to the attention of state environmental authorities after a Cal/EPA toxicologist noticed the site by coincidence. One day, while working on the federal superfund site across the street, this EPA scientist noticed a new building under construction. Out of curiosity, this state official strolled across the street to the Jefferson site and was shocked to find it was a school.⁵

Possibly the most disturbing aspect of this report is the district’s STATEMENT OF OVERRIDING CONSIDERATIONS wherein it states:

The Board of Education finds that the mitigating measures discussed in the EIR will, when implemented, mitigate or substantively reduce most of the significant effects identified in the final EIR. Nonetheless, certain significant environmental impacts of the project are unavoidable even after incorporation of all mitigation measures. For such effects, the board has balanced the benefits of the project against such unavoidable environmental risks in approving the proposed project.

Had the district followed its own advice and conducted a timely and reasonable toxicity analysis, considering what was known of the site’s history at the time, it is reasonable that

⁵ EPA Preliminary Assessment, Hard Chrome Products, ID# V-9299-252-01-0, November 22, 1995, Prepared by Ken Chang, pg. 8.

the district would have, at the least, determined further testing was necessary before purchasing the property. Once the school was built, and the Cal/EPA required the district to reanalyze the extent of the property's contamination, the following was discovered:

There are three contaminants of concern: (1) trichloroethylene (TCE) and (2) hexavalent chromium ("Chrome 6"), both of which are known to cause cancer, and (3) lead which is a heavy metal that can cause serious health problems in young children.

One reason the LAUSD did not know the extent of their toxicity problems is evidenced in a request dated January 23, 1990, made by LAUSD Environmental Health and Safety Branch Director, Susie Wong, wherein it states:

Since [the Phase II assessment] does not require the contractor to drill to a known groundwater source (drilling will be done to a depth of 50 feet and ground water is known to be at 200 feet) it is requested that the Pollution Liability Insurance requirement be waived for this contract. Should this contractor [Lindmark Engineering] be retained to perform any remediation of the site (Phase III), however, pollution liability requirements should be reinstated.

While the Phase II assessment may technically not "require" drilling to ground water, the entire process, as stated by Huff and others, is based on notions of *due diligence*. It is arguable that had the Phase II assessment been performed with due diligence prior to the purchase of the land, engineers would have found record high levels of the highly carcinogenic Chromium 6 in the soil and groundwater.

While Lindmark's Phase II assessment did not drill to groundwater, it did identify the presence of VOCs. Lindmark's report states:

Since contamination is volatile, it is recommended that a vapor extraction and vapor cleanup system be used to remove this contamination. Design permitting and installation of such a system is estimated to require four to five months. The actual cleanup will likely require six to twelve months.

Yet the LAUSD did not install such a system until years later at the direction of Cal/EPA and after the school was built. Why the LAUSD failed to follow the advice of even their inadequate Phase II assessment might be due to the “rush” label placed on the project by the district’s real estate business office. In an internal memo from Niccum to LAUSD Facilities Project Manager, Rodger R. Friermuth:

The State Allocation Board approved the Phase II land acquisition portion of the project on January 11, 1998. Therefore, the 60-day clock to acquire the property has started. Please initiate your land acquisition procedures as soon as possible so that we might meet the imposed deadline.

The problem is that Lindmark’s Phase II draft report would not be published until June 25, 1990 – eighteen months later. There are numerous other internal documents that discuss the time problem and the yet to be conducted soil tests.⁶ It appears in this case that business concerns were placed before due diligence. It further appears that either the LAUSD withheld information from the state or state officials cooperated with the district to circumvent the intent of existing law. Either way, it appears that the Jefferson project lacks the basic elements of district due diligence.

⁶ Memo to File, September 19, 1989 signed R. Hobson; To Rodger Friermuth from Royger Hobson dated September 22, 1989; To Rodger Friermuth from Royger Hobson dated October 10, 1989.

Role of the State Allocation Board

SAB Assistant Executive Officer, Lyle Smoot, offered the following testimony concerning the oversight role of his office:

The SAB is a financing authority and the only issues that the board typically concerns itself directly with are cost issues. In that regard, site acquisition and the cost of site acquisition is an important part of that. The board has limited review authority as regards to a number of issues that go along with cost.

The general movement of the legislature with regards to the state school building program is to have the SAB have less oversight into school construction issues and to concentrate on eligibility for dollars and once that eligibility has been determined, turn those dollars over to the school district where it then becomes a local issue.

The current policy of the SAB is that we only buy clean safe sites for school facilities. In that regard, however, we rely heavily on the local school district, the CDE and other state agencies to go through the process and determine that the sites we provide funding for are safe. We rely heavily on “due diligence.”

In the case where environmental remediation is required, the SAB withholds a portion of funding until the site has been fully remedied. Policy is that any cost of remediation, when added to the purchase price that exceeds our determination of the sites total value, must be paid for by the district [e.g., if a site is valued at 7 mil and cleanup is 22 mil, then the district must first make up the difference -- 15 mil -- before SAB will approve any allocation.].

Why did the SAB release funding for the Jefferson project on January 11, 1989, prior to conducting the Phase II assessment and subsequent completion of contaminant

remediation as required by law?⁷ The committee wrote Smoot in a follow-up hearing letter to inquire about this apparent discrepancy only to find that Smoot had been hired since the hearing by, and gone to work for, the LAUSD. Taking Smoot's place at the SAB is Assistant Executive Officer, Bruce B. Hancock. According to Hancock:

The SAB approved the site acquisition as well as related relocation and demolition expenses [for the Jefferson site] in January 1989. Neither the Office of Public School Construction (OPSC) nor the SAB had knowledge of toxic contamination issues at that time.⁸

It appears reasonable to wonder: How could the LAUSD have known what they did about the prospective Jefferson property, claimed to state officials that the property was free from toxic contamination and still have remained honest in their dealings?

While toxicity levels in the immediate groundwater do not pose a health risk to humans, there remains the issue of the contaminated water migrating to other aquifers that are used for drinking and of the related financial liability. Issues of liability remain outstanding as more data is collected and various parties jockey for position. The responsible parties for the Hard Chrome Products federal superfund site across the street from Jefferson Middle School are currently attempting to have the LAUSD named as a responsible party for groundwater remediation.⁹

In a letter from Cal/EPA to the Southern California Water Company dated October 9, 1996, Cal/EPA states that the highly carcinogenic Chromium 6 beneath the Jefferson site exceeds the maximum healthful levels by 540 percent as set by the California Department of Health Services. It is the plan of all responsible parties to remediate the groundwater in

⁷ See attached: Jefferson Middle School, Chronology of Events, Office of Public School Construction July 20, 1998.

⁸ Letter to the Honorable Scott Wildman from SAB Assistant Executive Officer Bruce B. Hancock, dated July 24, 1998.

⁹ October 1, 1997, letter from Stephen T. Holzer, attorney for Parker, Miliken, Clark, O'Hara & Samuelian, to Ken Chang, Project Coordinator, Department of Toxic Substance Control.

question before it migrates and contaminates area wells. The nearest well used for drinking is situated 0.5 miles to the southeast of Jefferson. This nearby well registers levels of Chrome 6 that are currently within healthful limits.

The LAUSD is now requesting that the SAB reimburse them for the costs for environmental remediation at the Jefferson site. On July 10, 1998, the LAUSD requested that the SAB pay an additional \$513,000 in environmental remediation costs connected to the Jefferson site.¹⁰ Considering that the LAUSD did not disclose the extent of the Jefferson site's toxic contamination to the SAB or to the California Department of Education in order to be eligible for state funding, this after-the-fact appears presumptive. According to Hancock, the SAB has not yet made a determination concerning this request.

Complexities of Asserting Eminent Domain

During Rosanne Harding's testimony, she expressed concern over the practical dynamics of property assessment prior to the decision to evict. The scenario is itself problematic. Consider the following:

You are a public entity with eminent domain authority knocking on the door of a prospective target. The public entity announces to the on-going business: "We're here to conduct unsightly, damaging and disruptive boring samples in order to determine if we're going to force you to relocate. There is no good news here for the current owner of the property.

Harding suggested that the state might consider ways to help facilitate the awkward situation created by prospective eminent domain discovery. Further, Harding suggested that the State may also wish to consider ways to assist local agencies with identifying

responsible parties by creating a clearing house at the state level of such information already in the hands of various public state and federal agencies. A computer network system could be created, for instance, which would collect existing data and make it available in an accessible form without requiring extensive additional labor.

NAVIGATING THE COURSE OF DUE DILIGENCE: **How things can go wrong even when you do everything right.**

The CEQA Deskbook contains a work page that lists forty local, state and federal agencies that a district must consider contacting when contemplating the construction of a new building.¹¹ There is unquestionably going to be a certain amount of jurisdictional crossover when a district attempts to satisfy all agencies at once. Jurisdictional crossover is precisely what San Juan Unified School District, Assistant Superintendent, David Doomey, testified to before the committee. Doomey began his testimony by recalling the planning for one school that began five years ago. According to Doomey:

An environmental impact report was prepared by the district that was forwarded to various agencies for review and comment. Some agencies responded and some did not. Those agencies that responded had their comments incorporated in the design of the school. For example, the U.S. Fish and Wildlife Service (USFWS) recommended that the district keep clear of the coastal sage habitat since that is where the gnatcatcher lives. In fact, the tennis courts planned for the high school had to be moved so that the bouncing tennis balls would not disturb the mating habits of the bird.

As the district began processing its section 404 Wetland Removal Permit, word was received from the Army Corps of Engineers and the U.S. Environmental Protection Agency that they had serious concerns regarding our plans. The

¹⁰ Letter to the Honorable Scott Wildman from SAB Assistant Executive Officer Bruce B. Hancock, dated July 24, 1998.

¹¹ 1996 California Environmental Quality Act Deskbook, pg. # 134.

concerns raised by both agencies were due to the fact that rules were changed at the federal level.

When our EIR was certified in 1996 a Nation Wide Permit could be granted if less than 10 acres of wet lands were anticipated to be removed. Our original plan indicated that impacts would be less than 9 acres of wetlands. Then in February 1997, the rules changed. A Nation Wide Permit would be granted if wetlands impacts were now less than 3 acres. This change created significant hurdles to the district. It basically required that the district change nearly every element of the school design except the building pad area including moving portions of the school plan to property owned by another landowner.¹²

Doomey concluded his testimony by asking that the state consider “grand-fathering” rules and decisions so that projects are free from trying to second guess, and becoming subject to, future shifts in regulations.

¹² “Remarks to the JLAC, June 17, 1998, by Assistant Superintendent, Capistrano Unified School District, David A. Doomey.

RECOMMENDATIONS

- The Legislature may wish to consider ways to motivate districts to work collaboratively with their constituents.
- Districts must be held accountable and understand that it is clearly unacceptable to violate or attempt to circumvent existing environmental law. The state may wish to consider making willful violation of the education code an offense punishable by personal fine or the threat of jail.
- The Legislature may wish to develop a list of “red flags” that trigger exhaustive environmental discovery when such items as the following exist:
 - A railroad track along one side of the property;
 - Heavy industry or manufacturing on or near prospective school sites.
- Local districts may wish to consider making their environmental staff independent and distinct from real estate and business staff in order to ensure the utmost scientific objectivity in environmental assessments.
- The Legislature should determine ways to assist districts with the awkward dynamics of eminent domain discovery.
- The Legislature may wish to create an office within an existing department that serves as a clearinghouse and liaison between local districts and the many state and federal environmental oversight agencies.
- The Legislature should increase the field and the oversight staff of the Department of Education to avoid the possibility of bad decisions being made due to willfulness or lack of diligence on the part of an overburdened staff.
- The work of the various state agencies responsible for land acquisition and construction assistance and regulation should be coordinated. The legislature may wish to grant the expanded enforcement and oversight authority to those agencies to ensure district compliance with the rules and regulations promulgated by the legislature and other regulatory bodies for the health and safety of our schoolchildren.

Appendix A – Witness Testimony

Appendix B – Environmental Reports on Jefferson Middle School

Appendix C – State Agency Action on Jefferson Middle School